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No. 94-2060

SUPREME COURT OF THE UNITED STATES

October 1994 Term

ARCO Products Co.,
Petitioner,

v.

Graham Oil Co.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. Summary.

In opposing certiorari, Respondent says that this case is limited to its own facts and to one statute. This is wrong; Judge Reinhardt's sweeping logic applies to typical arbitration clauses that implicate almost any statutory remedy. Respondent also argues that the arbitration provisions were not "mutual" (in the sense that they were not desired by Respondent) and therefore are invalid. This argument is legally unsupportable in light of the decisions of this Court and the courts of appeals. Finally, Respondent says that this case does not involve appellate fact-finding. Respondent is wrong. And if Respondent were correct, it would only increase the need for review because the majority opinion would have used additional incorrect rules of law.

2. The majority's logic applies to almost every arbitration clause that modifies a statutory right.

Respondent argues that the majority opinion below has only limited effect. Examination of the majority's rationale shows the opposite. The majority says that:

1. The arbitration provisions affect rights granted by statute.
2. The statute is designed to remedy a "disparity of bargaining power," *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246 (9th Cir. 1995), that are "important to the effectuation of the [statute's] policies," *id.* at 1248, and therefore are unwaivable.
3. The arbitration provisions containing these waivers are "highly integrated," *id.* at 1248; valid even if the remainder of the agreement is invalid, *id.* at 1249; and "establish[] a unified

procedure for handling all disputes, and its various unlawful provisions are all a part of that overall procedure." *Id.*

These rationales are not narrow or limited. They apply to most arbitration provisions that could modify statutory rights. First, a standard arbitration clause is broad enough to cover rights created by a variety of statutes, *e.g.*, almost *any* consumer, employment, securities, or franchise, or any other legislation. *See, e.g.*, American Arbitration Association, Commercial Arbitration Rules, Standard Arbitration Clause (covering "[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof . . ."). Second, these statutes are typically designed to change the balance of bargaining power among private actors by creating new procedural or substantive rights. *Cf., e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991) (citing employer/employee and security dealer/investor relations as examples of unequal bargaining power).[1]

Finally, the majority's description of the three salient features of the arbitration provisions and their relation to the waivers also applies broadly. Respondent does not dispute that such waivers are typical in arbitration agreements used in a wide variety of settings. Those provisions can easily be characterized as meeting the majority's test of "integrated" or (assuming that there are degrees of integration) "highly integrated." As the majority

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[1]The majority opinion does not even depend on whether the statutory rights come into play. For instance, the majority condemns the shortened limitation period without any finding that it is at issue. Thus, the majority's rationale allows a party to avoid arbitration of a common law claim if that party can point to any modification of a statutory right, even if that right or statute is not involved in the case.

admits, all arbitration clauses are severable from the remainder of the contract (absent clear, contrary intent). *Graham Oil.* 43 F.3d at 1248; *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967). Thus, like the clause here, arbitration clauses are, as a rule meet the majority's test of being "valid even if the remainder of the agreement is invalid." Finally, every arbitration clause meets the third part of the majority's test by establishing a "unified procedure for handling disputes," and any waivers, like the waivers here, become "part of that overall procedure."

So contrary to Respondent's argument, the majority's rationales apply widely outside the PMPA setting. The majority opinion allows the invalidation of many arbitration clauses containing provisions affecting statutory remedies. As pointed out in the Brief *Amicus Curiae* of Kaiser Foundation Health Plan, the danger is not hypothetical. The majority opinion is now the springboard for wholesale attacks on arbitration clauses outside the PMPA context. It is a dangerous precedent that multiplies litigation; delays or avoids arbitration; and invalidates entire arbitration agreements that "stand up quite well without the offending provisions and would have been acceptable to both parties in that form," *Graham Oil,* 43 F.3d at 1251 (Fernandez, J., dissenting), and does so based solely on "satellite" provisions, *id.* at 1250, that may not even be involved in the dispute.

3. **The purported lack of mutual agreement is not a basis for invalidating an arbitration clause.**

Petitioner pointed out that the modifications of statutory rights are "mutual" -- they apply to both parties. Respondent argues that the modifications are invalid because they were not "mutually agreed to." Although it sounds similar, this argument

does not question Petitioner's point. Moreover, it is fatally flawed.

If it is based on the notion that the particular arbitration provisions in this case are adhesive as a matter of fact, then the argument is based on improper appellate fact finding. If, on the other hand, it is based on a rule that arbitration provisions in a form contract are adhesive as a matter of law, it is contrary to the well-established holdings of this and other courts.

To the extent that Respondent's argument is factually based, it contradicts both the holdings of this Court and the Ninth Circuit that determinations of unequal bargaining power must be made case-by-case, by the district court. *See, e.g., Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (*quoting Gilmer,* 500 U.S. at 33). Here, the district court made no such determination. So if the majority opinion is based on factual determinations, it is improper, *appellate* fact-finding and more reason to issue a writ of certiorari.

To the extent that Respondent is arguing that the arbitration clause is *per se* adhesive, such an argument contradicts the law. A decision whether an arbitration provision is adhesive must be made in light of the federal statutory pro-arbitration policy. *E.g., Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282, 285 (9th Cir. 1988) (addressing similar contentions "mindful of the Supreme Court's dictate that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" (quoting *Moses H. Cone Mem. Hosp.,* 460 U.S. at 24.). When this is done, courts consistently reject a rule that arbitration provisions are *per se* adhesive.

For instance, in *Pritzker v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 7 F.3d 1110, 1118 (3d Cir. 1993), the arbitration clauses were in form agreements and the parties had unequal bargaining power, but the court "reject[ed] any insinuation that the clauses represent contracts of adhesion." *See also, e.g., Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 700 (10th Cir. 1989) ("There is certainly nothing inherently unfair about the arbitration clauses, and they are therefore valid and enforceable.") (emphasis deleted) (citing *Surman v. Merrill, Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61 n.2 (8th Cir.1984)); *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("[T]here is nothing inherently unfair or oppressive about arbitration clauses") (citing *Surman*); *In re Sharp Electronics Corp.*, 604 F. Supp. 239, 242 (S.D.N.Y. 1984) (arbitration clauses in franchise agreements are not uncommon and are not unconscionable).

The majority below originally included the kind of argument advanced by Respondent, *see Graham Oil Co. v. ARCO Products Co.*, slip op. at 15520-21 (9th Cir. Dec. 16, 1994) (arbitration provisions here were contracts of adhesion that must be strictly construed against the drafter), but withdrew it after the Petition for Rehearing. Thus, even the majority below realized that this kind of argument is incorrect, and cannot stand up to scrutiny. So if the opinion below still incorporates Respondent's argument, it increases the need for review; it demonstrates either appellate fact-finding or a rule of law that contradicts the policies of the Federal Arbitration Act and the holdings of this and other courts.

4. **The majority actually engaged in improper appellate fact-finding.**

Respondent dismisses fact-finding by the majority below as a "rhetorical device." This argument asks this Court to ignore

not only what the majority said, but also what it actually did.

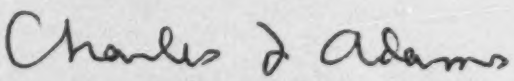
The majority relied on its view of Petitioner's intent and goals: Petitioner's supposed "attempt . . . to achieve," Petitioner's supposed "attempt[] to use," Petitioner's supposed "unlawful ends," and Petitioner's supposed "scheme to contravene public policy." *Graham Oil,* 43 F.3d at 1249. These are all factual issues, unsupported by any finding in the trial court. Thus, the majority not only said that it relied on determination of "fact"; it actually relied on factual findings that were not made in the trial court.

Moreover, while arguing that the majority did not rely on appellate fact-finding, Respondent offers no other adequate explanation for the majority opinion. But if the majority did not engage in fact finding, it must have reached a conclusion that is contrary to law. If it did not find facts, the majority must have concluded that statutory waivers prove illegal intent, illegal goals, and a scheme to contravene public policy *as a matter of law*. This is incorrect. The majority instead should have applied two rules of law. The first is that of *Cone,* that all doubts are resolved in favor of arbitration. The second is the well-accepted rule of contract and arbitration law that illegal provisions in contracts are to be disregarded or curtailed, John D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS § 22-2(d), at 893 (3d ed. 1987), including such provisions in arbitration clause. *E.g., Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217 (1985). The majority did not acknowledge (or apply) either rule. So if the majority did not engage in appellate fact-finding, there is additional reason to grant certiorari.

5. Conclusion.

The majority opinion affects every broad arbitration clause that has any language that potentially modifies a statutory right. The decision below is now being to attack those clauses in non-PMPA settings. Respondent's arguments are either wrong, or if credited, mean that the majority opinion below is an even more radical break with the arbitration law embodied in the precedents of the courts of appeals and this Court. Therefore, this Court should issue a writ of certiorari to review this case.

Respectfully submitted,



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